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CITATION

Statute:

Railroad Retirement Act, as amended, 50 Stat. 307, 54 Stat. 264, 785, 786, 45 U. S. C. Sec. 228a; 50 Stat. 314, 45 U. S. C. Sec. 228j; 50 Stat. 315, 45 U. S. C. Sec. 228k:

Sec. 1	7
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495737—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 478

NEVADA CONSOLIDATED COPPER CORPORATION, NEVADA NORTHERN RAILWAY COMPANY, AND KENNECOTT COPPER CORPORATION, PETITIONERS

v.

RAILROAD RETIREMENT BOARD, RAILROAD LABOR EXECUTIVES ASSOCIATION, AND BROTHERHOOD OF RAILROAD TRAINMEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RAILROAD RETIREMENT BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 433) is reported in 129 F. (2d) 358. The opinion of the District Court of the United States for the District of Colorado (R. 80) is reported in 41 F. Supp. 763.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1942 (R. 442). A petition for rehearing was denied August 11, 1942 (R. 451). The petition for a writ of certiorari was filed on October 22, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain persons engaged in transporting ore by the use of facilities of a common carrier were properly determined by the Railroad Retirement Board to be "employees" of the carrier within the meaning of that term in Section 1 (b) of the Railroad Retirement Acts of 1935 and 1937, as amended (50 Stat. 307, 54 Stat. 264, 45 U. S. C. Sec. 228a).

STATUTE INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, as amended, appear in the Appendix.

STATEMENT

Petitioner Nevada Northern Railway Company was organized as a common carrier and its facilities were constructed primarily to provide transportation for the ores of its parent (the predecessor of petitioner Nevada Consolidated Copper Corporation) (R. 189, 190, 191,

197). From the beginning of operations in 1908 until September 1, 1920, the railway company transported the ores under public tariffs and the individuals employed in this transportation were employees of the railway company (R. 218, 219). However, on or about September 1, 1920, for the admitted purpose of avoiding the application of the recapture provision of section 15a of the Interstate Commerce Act to the excess income of the railway company, the predecessor copper company took title to the ore hauling equipment and entered into an agreement dated May 28, 1920, with the subsidiary railway company which purported to grant to the copper company the right to conduct the ore transportation then being performed by the railway company (R. 272, 273). As a result of the agreement the copper company was substituted as the maker of the pay checks of the individuals employed in this service, but no substantial change occurred in the conduct of ore transportation operations. The same railroad officers and employees who before the execution of the agreement had instructed the men engaged in this ore transportation as to the work to be done, and the manner and means of performing it, and who had engaged these men for service or discharged or disciplined them, continued after the execution of the agreements to exercise the same functions with respect to the same men (R. 202, 203, 205,

206, 219). The entire ore movement of the railroad continued to be under the complete control and supervision of the officers and employees of the railway company (R. 202, 203, 205, 206, 219).

A number of the individuals employed after September 1, 1920, in the ore transportation service on the railroad filed with the respondent Railroad Retirement Board applications for annuities under the Railroad Retirement Acts, claiming that their service in such ore transportation was creditable under the Railroad Retirement Acts as service to a covered employer (R. 180; Ex. 2, R. 316–318). The Board ordered a hearing before an examiner, such a hearing was held, full opportunity was given to all interested parties to present evidence and arguments, the examiner issued a report, exceptions were filed, and a Board decision was rendered on the basis of the evidence and arguments presented (R. 26, 89, 127, 178, 180; Ex. 1, R. 314). The Board found that the individuals employed after September 1, 1920, in transporting ore on the railroad of the petitioner Nevada Northern Railway Company were "in the service" of the railway company (Section 1 (c)), and therefore were "employees" of the railway company within the meaning of Section 1 (b) of the Acts (R. 41).

Petitioners then brought suit in the District Court of the United States for the District of Colorado under Section 11 of the Railroad Retire-

ment Act of 1937 (50 Stat. 307, 315, 45 U. S. C. Sec. 228k) to set aside the Board's decision. The District Court held that in reviewing Board decisions under Section 11 of the Railroad Retirement Act of 1937, the authority of the court is limited to the question whether the Board's decision was arbitrary or capricious or unsupported by substantial evidence; and upon finding that there had been a full and fair hearing before the Board, and that the record before the Board contained substantial evidence in support of the decision, the court dismissed the suit (R. 80–86). The United States Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court, but on different reasoning. The Circuit Court of Appeals stated that a reviewing court is not bound by the Board's decision as to the employee status of the workers involved, and that the District Court had committed "error in dismissing the proceedings on the ground that the decision of the Board in this respect was final because supported by competent evidence" (R. 438). The court found as an independent proposition, however, that the workers engaged in ore haulage were "employees" of the railway company (R. 433–442).

DISCUSSION

As appears from the foregoing statement, except for the fact that this case does not present any issue as to the creditability of service rendered

by copper company employees in railroad repair shops, the facts and issues in this case do not differ materially from those in the companion *Utah Copper Company* case, No. 479. The Argument in the Government's memorandum in the *Utah* case, filed concurrently herewith, is applicable to the case at bar, and no useful purpose would be served by repeating it here.

CONCLUSION

We respectfully submit that the decision of this Court as to whether certiorari should be granted in the *Utah* case should control in this case.

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NOVEMBER 1942.